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NTSB Order No. EA-4257

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of September, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-13321
v.)	
)	
PAUL NAVE,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge Jerrell R. Davis rendered in this proceeding on March 10, 1994, at the conclusion of an evidentiary hearing on an emergency order of the Administrator revoking respondent's private pilot certificate (No. 552456723).¹

By that decision, the law judge dismissed the Administrator's

¹An excerpt from the hearing transcript containing the initial decision is attached.

allegation that respondent had falsified two medical certificate applications in violation of section 67.20(a)(1) of the Federal Aviation Regulations ("FAR"), affirmed the allegation that respondent's certificate was vulnerable to suspension or revocation under FAR section 61.15(a)(2) because he had been convicted of certain Federal drug offenses, and concluded that the latter charge warranted an 8-month suspension, not revocation.² The Administrator has appealed only from the modification of the sanction sought in his order. For the reasons discussed below, we will grant the appeal and reinstate revocation.

The law judge's decision on sanction cannot be reconciled

²FAR sections 61.15(a)(2) and 67.20(a)(1), 14 CFR Parts 61 and 67, provide as follows:

§ 67.20 **Applications, certificates, logbooks, reports, records: Falsification, reproduction, or alteration.**

(a) No person may make or cause to be made--

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part....

§ 61.15 **Offenses involving alcohol or drugs.**

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--

* * * * *

(2) Suspension or revocation of any certificate or rating issued under this part.

Respondent waived expedited review of these charges under Subpart I of the Board's rules of practice for emergency cases. See 49 CFR Part 821.54--57.

with our recent holding, in Administrator v. Piro, NTSB No. EA-4049 (1993), at p. 4, that any conviction involving the sale of drugs should be considered serious enough to draw revocation under FAR section 61.15:

In our judgment, any drug conviction establishing or supporting a conclusion that the airman possessed a controlled substance for profit or commercial purposes is a flagrant one warranting revocation under the regulation. An individual who knowingly participates in a criminal drug enterprise for economic gain thereby demonstrates such a disregard for the rights and lives of others that he may reasonably be viewed as lacking the capacity to conform his conduct to the obligations created by rules designed to ensure and promote aviation safety.

That holding by its unequivocal terms is not dependent on the amount or kind of drugs at issue in the state or Federal criminal action or on any other factor that the presiding judge might have deemed relevant in determining the length or severity of any sentence to be imposed. In other words, Piro established that one category of drug conviction should always be considered serious enough to justify the Administrator's choice of revocation under FAR section 61.15, without regard to the seriousness of the airman's actual conduct in connection with the conviction.

In this case, the law judge recognized that revocation appeared to be mandated under Piro because the respondent had been convicted of, among other things, three counts of sale/transportation of cocaine and one count of possession of cocaine with intent to sell. Nevertheless, he concluded that a sanction less than revocation was permissible because he believed

that the respondent had rehabilitated³ himself following the convictions and because he construed a Board case decided after Piro to permit consideration of that circumstance on the matter of sanction. We disagree with the law judge's conclusion.

The Board did not, in Administrator v. Bakhtiar, NTSB Order No. EA-4082 (February 15, 1994), indicate that an airman's possible rehabilitation from drug use or from a life of crime should be considered in reviewing the issue of sanction in a case charging FAR section 61.15. Rather, the Board, in discussing the Administrator's sanction guidelines in FAA Order 2150.3A (Appendix 1, Compliance and Enforcement Bulletin 90-2 (1990)), noted that rehabilitation was one of the factors that the Administrator considers in determining what sanction to pursue.⁴

This discussion was prompted by the respondent's argument that his 1980 drug convictions should be deemed too stale to support any sanction.

The Board discounted this argument and revocation was upheld in Bakhtiar. Moreover, the acknowledgment of a factor bearing on the Administrator's judgment in bringing a particular drug conviction case should not have been read to reflect a retreat

³The law judge's assessment that respondent had been rehabilitated appears to be based on no more than his testimony that he had not used drugs since his convictions, that is, during the roughly three years he served in prison, and on his efforts to make an honest living in the eight-month period between his release from prison and the hearing.

⁴The Administrator, in arguing that his prosecution was consistent with his guidelines, pointed out that respondent had been convicted of a non-drug Federal offense in 1990.

from the rationale expressed in Piro. As noted above, the language in Bakhtiar cited by the law judge was concerned with the question of the Administrator's proper exercise of his prosecutorial discretion, not with the issue of the appropriateness of revocation on proof of conviction of a specific crime; namely, selling narcotic drugs.⁵ Nevertheless, given the law judge's misreading of Bakhtiar, and the possibility that other law judges may also be confused as to the proper scope of the Board's review in a FAR section 61.15 case, our view that an airman's possible post-conviction rehabilitation is not a germane consideration warrants some explanation.

Whether an airman has been cured of a drug dependency subsequent to a drug conviction is essentially a medical question that, however relevant it may be to the Administrator's decision to prosecute, has no relevance to our review of his selection of a sanction for the conviction itself. This is so because the decision to suspend or revoke a certificate under the regulation is not designed to punish the airman for his having been an addict or user, but to sanction the deficient judgment associated with his proven unlawful drug activity. Similarly, while proof that an airman no longer engages in unlawful drug activity may be persuasive to the Administrator in deciding whether to initiate

⁵The respondent in Bakhtiar had been convicted in Federal court of conspiracy to violate federal narcotics laws, of distribution of heroin, of use of a telephone to facilitate possession and distribution of heroin, and of interstate travel in aid of racketeering. The Administrator did not argue that these drug convictions alone warranted revocation, and we, thus, did not reach the issue.

an enforcement action in the first instance or to permit the requalification of an airman previously revoked for a drug conviction, such evidence does not lessen the seriousness of the conviction the regulation empowers the Administrator to sanction.

In these circumstances, modifying or reducing a sanction on the basis of evidence of post-conviction rehabilitation represents a prosecutorial judgment respecting the individual airman, rather than an adjudicative judgment on the Administrator's case against him. The former judgment falls within the Administrator's province, the latter within ours.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed to the extent it modified the sanction sought in the emergency order of revocation and is otherwise affirmed; and
3. The revocation ordered by the Administrator in the emergency order of revocation is affirmed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board concurred in the above opinion and order.